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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

NUMBER 655

RADCLIFF GRAVEL COMPANY, INC., and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,

Petitioners,

Versus

JOSEPH H. HENDERSON, as Deputy Commissioner United States Employees Compensation Commission for the Seventh Compensation District, SAM ROCKER, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI

BRIEF FOR PETITIONERS

BY

PALMER PILLANS

WILLIAM G. CAFFEY

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

NUMBER.....

RADCLIFF GRAVEL COMPANY, INC., and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,

Petitioners,

Versus

JOSEPH H. HENDERSON, as Deputy Commissioner United States Employees Compensation Commission for the Seventh Compensation District, SAM ROCKER, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Radcliff Gravel Company, Inc. and American Mutual Liability Insurance Company pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the case of Radcliff Gravel Company, Inc. and American Mutual Liabiliy Insurance Company v. Joseph Henderson, as Deputy Commissioner United States Employees Compensation Commission for the Seventh Compensation District, Sam Rocker, Sr., et al., Number 10736 on the docket of said court entered on November 3, 1943 (Rec. p. 116) affirming the final judgment of he District Court of the United States for the Southern Disrict of Alabama in said cause (Rec. p. 106).

SUMMARY STATEMENT OF MATTER INVOLVED.

On September 2, 1942, Joseph H. Henderson, as Deputy Commissioner for the Seventh Compensation District, United States Employees Compensation Commission entered an award under the Longshoremen's and Harbor Workers' Compensation Act awarding compensation for the death of an employee of Radcliff Gravel Company, Inc., against petitioners as employer and insurance carrier (R. p. 18). A proceeding was instituted by petitioners in the United States District Court for the Southern District of Alabama to review, set aside and enjoin said order (R. p. 2). A decree dismissing appellant's petition or libel to review, revise and enjoin said order was entered by said District Court (R. p. 106) and on appeal to the United States Circuit Court of Appeals for the Fifth Circuit said decree was affirmed by that court (R. p. 116).

The essential facts in regard to the employment of decedent and the circumstances and conditions under which he met his death were stipulated before the Deputy Commissioner (R. p. 35, 36-39). The facts stipulated show that Radcliff Gravel Company, Inc. employed the decedent, to whose dependent compensation was allowed under the Longshoremen's and Harbor Workers' Compensation Act, with others in dredging operations which it was then conducting at Three Rivers Lake, a navigable body of water in Clarke County, Alabama.

The purpose of the dredging operations was to produce or acquire gravel and sand to be sold by Rad-

cliff Gravel Company, Inc., in the prosecution of a gravel and sand business conducted in Mobile, Alabama. The dredging operations themselves consisted in raising said materials from the bottom of the lake and drawing them through pipes by means of a suction type dredge. These pipes discharged the materials into barges provided by Radcliff Gravel Company, Inc. for their reception. Some workmen or employees operated the dredge, some moved the barges up and down alongside the dredge, while the gravel and sand were being sucked into them by the dredge. The decedent, as the gravel and sand were sucked into the barges, leveled it off to keep it from forming cone-shaped piles. He worked with and as part of the dredging crew, and his work was essentially a part of the dredging operations. He did not place the gravel and sand on the barges. That was done by means of the suction dredge operated by other employees. He had nothing to do with, and took no part in, the moving of the barges to Radcliff's sand and gravel yard in Mobile. His sole function was to level off gravel and sand as it was deposited in barges by the operation of the dredge. The pumping of the gravel and sand into the barges by others was preliminary to and was entirely incidental to its subsequently being towed to Mobile. It was primarily and directly a **dredging operation** to produce gravel and sand by pumping it from the bottom of the lake.

At the time of his death decedent was not engaged in any work under his contract of employment. At six o'clock on the morning of December 23, 1941, he and his shift finished their work for the day and were knocked off until after Christmas. A number of this

shift, including decedent, thereafter started in a small boat propelled by an out-board motor for McIntosh Landing en route to Mobile, where they were to be paid off. They were to go home for the Christmas holidays and were expected to return to work on December 26th. After the out-board motor boat had gone about a mile from the dredge and had reached a point about four miles from McIntosh Landing it capsized or swamped and decedent was thrown into the waters of Three Rivers Lake and drowned. The outboard motor boat was furnished by the employer, Radcliff Gravel Company, Inc. for use in transporting its employees to and from their work at the scene of the dredging and to carry them to and from the shore where they were off duty and had occasion to go ashore and to return to the dredge. Under his employment deceased had nothing to do with the operation of the outboard motorboat and was not operating it on the occasion when he was drowned.

JURISDICTIONAL STATEMENT

This is a civil suit in admiralty in the United States Circuit Court of Appeals for the Fifth Circuit in which petitioners pray a writ of certiorari to review the judgment of said Circuit Court of Appeals, rendered in the above entitled cause on November 3, 1943 (R. p. 116) under section 240 (a) of the Judicial Code of the United States as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question here presented is whether on the stipulated and undisputed evidence the employee's death occurred upon the navigable waters of the United States under such circumstances that compensation could not "validly be provided by State law" so as to bring the case within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U. S. C. A. Sec. 903).

REASONS FOR GRANTING THE WRIT.

United States Circuit Court of Appeals for the Fifth Circuit by its judgment affirming the decree of the United States District Court for the Southern District of Alabama has decided a federal question in a way in conflict with applicable decisions of this court (Sultan Ry. Co. v. Dept. of Labor, 277 U. S., 135, 136-137; 48 S. Ct., 505, 506; 72 L. Ed., 82; Baizley Iron Works v. Span, 281 U. S., 222; 50 S. Ct., 306, 307; 74 L. Ed., 819; Alaska Packers Ass'n. v. Ind. Acc. Comm., 276 U.S., 467; 48 S. Ct., 346; 72 L. Ed., 656; Davis v. Dept. of Labor, 63 S. Ct., 225) and in conflict with the decisions of other Circuit Courts of Appeal.

PALMER PILLANS,

WILLIAM G. CAFFEY,

PROCTORS FOR PETITIONERS.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

OPINIONS BELOW.

There was no opinion rendered by the District Court in the above cause. The opinion in the Circuit Court of Appeals for the Fifth Circuit is reported in 138 Fed. (2d) 549.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on November 3, 1943 (R. p. 116). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 240 (a); 43 Stat., 936).

STATEMENT

A concise statement of the proceedings and of the question involved has been made in the foregoing petition.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Fifth Circuit erred in affirming (R. p. 116) the final decree of the United States District Court for the Southern

District of Alabama (R. p. 106) dismissing the libel of petitioners (R. p. 2).

2. The Circuit Court of Appeals for the Fifth Circuit erred in affirming (R. p. 116) the final decree of the United States District Court for the Southern District of Alabama (R. p. 106) dismissing the libel of petitioners (R. p. 2) for this, that under the undisputed testimony in the cause, compensation for the death of the deceased employee could "validly be provided by state law" and compensation under the Longshoremen's and Harbor Workers' Compensation Act could not properly be awarded under the undisputed testimony.

BRIEF OF ARGUMENT

1. In determining whether a contract be of a maritime nature, locality alone is not controlling, since the true test is the subject matter of the contract—the nature and character of the work to be done under it.

Grant Smith-Porter Co. v. Rohde, 257 U. S. 469; 42 S. Ct., 157; 66 L. Ed., 321.

Erie R. Co. v. Welsh, 242 U. S. 303, 306, 37 S. Ct., 116; 61 L. Ed., 319.

State Ind. Comm. of N. Y. v. Nordenholt Corp., 259 U. S., 263, 42 S. Ct., 473; 66 L. Ed., 933.

2. The obtaining of materials by dredging was the primary purpose of the contract of employment of all Radcliff's dredging crew, including decedent, and a contract of employment to carry on or aid in dredging operations is not a maritime contract.

United Dredging Co. v. Lindberg, 18 Fed. (2d) 453 (C.C.A. 5th Circ.); 274 U. S., 759, 47 S. Ct., 769.

Fuentes v. Gulf Coast Dr. Co., 54 Fed. (2d) 69 (C.C.A. 5th Circ.).

Woods v. Merrill-Stevens D. D. & Rep. Co., 14 Fed., Supp. 208, (S.D. Fla.).

Orleans Dredging Co. v. Frasie, 161 So., 699 (Miss.); 296 U. S., 653, 56 S. Ct., 383.

Central Eng. Co. v. Bassett, 42 Fed. Supp., 750, 752.

Lindberg v. So. Casualty Co., 15 Fed. (2d) 54.

Southern Surety Co. v. Crawford, 274 S. W. 280, 281; 46 S. Ct., 353.

3. Decedent's contract was a contract to engage in "dredging operations," just as the contract of the employee involved in Sultan Ry. Co. v. Dept. of Labor, 277 U. S., 135, 136, 137, 48 Ct., 505, 506; 72 L. Ed., 82, was to engage in "logging operations" (Baizley Iron Works v. Span, 281 U. S., 222; 50 S. Ct., 306, 307, 74 L. Ed. 819 was just as the contract of employees of Alaska Packers Association was to engage in "canning operations", (Alaska Packers Ass'n v. Marshall, 95 Fed. (2d) 279 (C.C.A. 9th Circ.). Surgeon v. Alaska Packers Ass'n, 26 Fed. Supp., 241 (N. D. Cal.). Alaska Packers Ass'n. v. Ind. Acc. Comm., 276 U. S., 467; 48 S. Ct., 346; 72 L. Ed. 656) and just as the employee measuring and cutting steel to proper lengths as it came aboard the barge on which he was working was engaged in "demolition work" in Davis v. Dept. of Labor, 63 S. Ct., 225.

4. Primarily and essentially decedent was employed to aid in the production of gravel and sand for sale in a local business. His contract did not concern the transportation of this material to the employer's yards, and so did not concern navigation or transportation on navigable waters. His services ended before any such transportation was to begin, and if such services were an aid to transportation on navigable waters they were entirely preliminary and purely incidental to such transportation. Decedent's contract of employment was accordingly not a maritime contract.

Sultan Ry. & Tbr. Co. v. Dept. of Labor & Ind., 277 U. S., 135, 138; 48 S. Ct., 505, 72 L. Ed, 820.

Davis v. Dept. of Labor & Ind., 63 S. Ct., 225.

Alaska Packers Ass'n. v. Marshall, 95 Fed. (2d) 279 (C.C.A. 9th Circ.).
Authorities under **2 Supra.**

5. If the contract of employment be considered maritime in any aspect, it involved merely a dredging operation purely local in scope, not "directly connected with commerce and navigation in their interstate and international aspect" (Great Lakes Dr. & Dock Co. v. Charlet, 134 Fed. (2d) 213, 214 (C.C.A. 5th Circ.) and "having only an incidental relation to navigation and commerce" (Sultan Railway & Tbr. Co. v. Dept. of Labor, 277 U. S., 135, 138, 48 S. Ct., 505, 506; 72 L. Ed., 820). In such cases compensation may "validly be provided by state law", and the state compensation law, not the Longshoremen's and Harbor Workers' Act, applies.

Sultan Ry. & Tbr. Co. v. Dept. of Labor, 277 U. S., 135, 138, 48 S. Ct., 505, 506; 72 L. Ed., 820.

Davis v. Dept. of Labor, 63 S. Ct., 225.

Baizley Iron Works v. Span, 281 U. S., 222; 50; S. Ct., 306, 307-8; 74 L. Ed. 819.

Alaska Packers Ass'n. v. Marshall, 95 Fed. (2d) 279 (C.C.A. 9th Circ.).

Travelers Ins. Co. v. Bacon, 119 S. E., 458 (Ga.).

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P. J. Carlin Constr. Co. v. Heany, 299 U. S., 41; 57 S. Ct., 75, 76.

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Woods v. Merrill-Stevens Dry Dock & Rep. Co., 14 Fed. Supp. 208 (S.D. Fla.).
Orleans Dredging Co. v. Frasie, 173 Miss., 882; 161 So., 699; 296 U. S., 653; 56 S. Ct., 383.
Exparte Rosengrant, 213 Ala., 202; 104 So. 409; 273 U. S., 664; 47 S. Ct., 454. 71 L. Ed., 829.
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Klump v. Ind. Comm., 29 N. E. (2d) 627, 628; 65 Oh. App. 270.
Belk v. Mossman Constr. Co. 275 N. W., 76 (Nebr.).

6. The test of whether decedent was engaged in a maritime service of such character that the state compensation laws could not be validly applied is what employee was doing at the time he met his accidental injury or death, not what he may have been required to do at some other time.

Miller's Ind. Underwriters v. Braud, 270 U. S., 59; 46 S. Ct., 194; 70 Ed., 470.
Parker v. Motor Boat Sales, 314 U. S., 244; 62 S. Ct., 221, 223; 86 L. Ed. 184.
Employers' Liability Assur. Corp. v. Cook, 281 U. S. 233, 236; 50 S. Ct., 308, 309; 74 L. Ed., 823.

7. In this case having definitely terminated all actual service to the employer, the employee while riding to shore in a small boat furnished by his employer in accordance with the contract of employment, was

not rendering any service in direct aid of navigation so as to preclude the application of the State Workmen's Compensation Act.

P. J. Carlin Constr. Co. v. Heany, 299 U. S., 41; 57 S. Ct., 75, 76.
King v. Glenn Falls Ind. Co., 124 Fed. (2d) 942 (C.C.A. 5th Circ.).

8. "Rulings of the deputy commissioner upon questions of law are without finality. So far as the latter are concerned, full opportunity is afforded for their determination by the federal courts through proceedings to suspend or set aside a compensation order**."

Crowell v. Benson, 285 U. S., 22; 52 S. Ct., 285, 290.
And see:
South Chicago Coal & Dock Co. v. Bassett, 309 U. S., 251; 60 S. Ct., 544.
United States Cas. Co. v. Taylor, 64 Fed., (2d) 521 (C.C.A. 4th Circ.).

ARGUMENT

In this case, an Alabama corporation, carrying on a local gravel and sand business, produced gravel and sand for sale in that business by dredging it from the bed of navigable waters in Clarke County, Alabama, conducting it through suction pipes and depositing it on barges which had no motive power and had to be towed to employer's yards at Mobile, Alabama. By Alabama contract decedent was employed to aid in these dredging operations by levelling gravel and sand as it was so deposited. The decedent was not a long-

shoreman or a stevedore in any true sense of those words. He was a dredge employee doing the work of dredge employees. His contract of employment had no direct relation to navigation. It did not concern the transporting of the dredged materials to the employer's yards, and so did not directly concern navigation or transportation on navigable waters. His services, while being rendered only incidentally and indirectly aided navigation, in that they prepared the materials so they could be more readily moved in navigation. These services ended before any transportation was to begin and if such services were an aid to transportation on navigable waters they were entirely preliminary and purely incidental to such transportation. Decedent's contract of employment was accordingly not a contract which would preclude the application of the State Compensation law.

Authorities under Points 3 and 5, **Supra.**

In the case of Sultan Ry. & Timber Co. v. Dept. of Labor, 277 U.S., 135, 48 S. Ct., 505, 506; 72 L. Ed., 820, the contract of employment of some of the employees there involved required them to boom logs on navigable waters so that they could be towed over navigable waters to a point adjacent to the employer's sawmill. Other employees involved, as part of their contract of employment, broke up the booms and actually moved the logs on navigable waters to the sawmill. It was held that this work constituted a service in a local business, in the one instance preliminary to actual transportation on navigable waters, and in the other after actual transportation on navigable waters had ceased and that the State Compensation law rather

than the Longshoremen's and Harbor Workers' Compensation Act applied to such employees. In the present case, the levelling of gravel and sand incidental to the process of dredging such materials into barges for subsequent towage to Radcliff's yards was certainly no more directly in aid of navigation than was the work of booming logs for such towage or the work of breaking up the booms in order that the logs might be moved over navigable waters to the sawmill, and the service was certainly just as local in character. The case now under consideration, as was said in Baizley Iron Works v. Span, 281 U. S., 222, 50 S. Ct., 306, 308-9, has "relation to the nature of the occupation of men engaged" in dredging operations and neither the fact that the service was performed on navigable waters, nor that it incidentally made the barges ready for towage to the employer's yards, changed the nature of said dredging operations or the local character of the employment.

Under the admitted facts, if the deceased employee had met his death while engaged in levelling gravel and sand on one of Radcliff's barges, his case would fall within the principles decided in Sultan Ry. & Timber Co. v. Dept. of Labor, Supra; Davis v. Dept. of Labor, 63 S. Ct., 225; Alaska Packers Ass'n. v. Marshall, 95 Fed. (2d) 279 (C.C.A. 9th Circ.); and Alaska Packers Assn' v. Ind. Accident Commission, 276 U. S., 467, 48 S. Ct., 346; 72 L. Ed. 656.

But decedent at the time he met his death was not levelling gravel and sand on the barge as it was pumped in. That duty had been completed prior to the time that he met his death. At the time of his death he

was merely on board a small boat in the course of his employment and his presence there was "purely incidental" to the duties of his employment and without any direct connection with or aid to navigation. What decedent did or was required to do at a prior time under his contract of employment does not control the question of whether he was or was not performing a service in direct aid of navigation at the time of his death. This question is determined by what he is doing at the time of the accident which resulted in his death.

Miller's Indemnity Underwriters v. Braud, 270 U. S., 59; 46 S. Ct., 194; 70 L. Ed., 470.
Parker v. Motor Boat Sales, 314 U. S., 244; 62 S. Ct., 221, 223; 86 L. Ed., 184.
Employers' Liability Assur. Corp. v. Cook, 281 U. S., 233, 236; 50 S. Ct., 308, 309; 74 L. Ed., 823.

Riding in a small boat furnished by his employer under the contract of employment, for the purpose of going ashore and on leave was not a maritime service in direct aid of navigation which excludes application of the State Compensation law.

P. J. Carlin Constr. Co. v. Heany, 299 U. S. 41, 57 S. Ct., 75, 76.
King v. Glens Falls Indemnity Co., 124 Fed. (2d) 942 (C.C.A. 5th Circ.).

The Circuit Court of Appeals has treated as applicable and as controlling in this case the cases of Parker v. Motor Boat Sales Inc., 314 U. S., 244; South Chicago Coal and Dock Co. v. Bassett, 309 U. S., 251 and Henderson v. Jones, 110 Fed. (2) 952.

In the first of these cases it was considered and ruled by the Court that an employee riding in a small boat driven by an outboard motor with the duty of looking out for snags in the river was so far actually engaged in navigation that the State Compensation law could not be applied to him. In this case the employee had no duty to perform in the navigation either of the small motor boat in which he was riding to shore for the Christmas holidays, or in the navigation of any loaded barge when it should come to be towed to Mobile.

The other two cases cited involve the direct performance of duties on the part of the employee in aid of the coaling of vessels engaged in navigation. None of these cases is applicable unless it can be truly said, as the opinion of the Circuit Court of Appeals indicates, that all that is necessary to bring a case within the Longshoremen's and Harbor Workers' Compensation Act is that injury or death should have occurred upon the navigable waters of the United States. So to hold is in direct conflict with the decisions of this Court.

Authorities, Points, 1, 4 and 7, **Supra.**

We respectfully submit that the Court of Appeals has misapplied the holding of the cases which it has relied upon and has failed to apply the decisions of other cases in this Court, and in other Courts of Appeal, directly applicable to the facts as disclosed by the stipulated and undisputed facts of the case.

Authorities, Points 3, 4 and 5, **Supra.**

Respectfully submitted,

PALMER PILLANS

WILLIAM G. CAFFEY

PROCTORS FOR PETITIONERS.

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OCTOBER TERM, 1943

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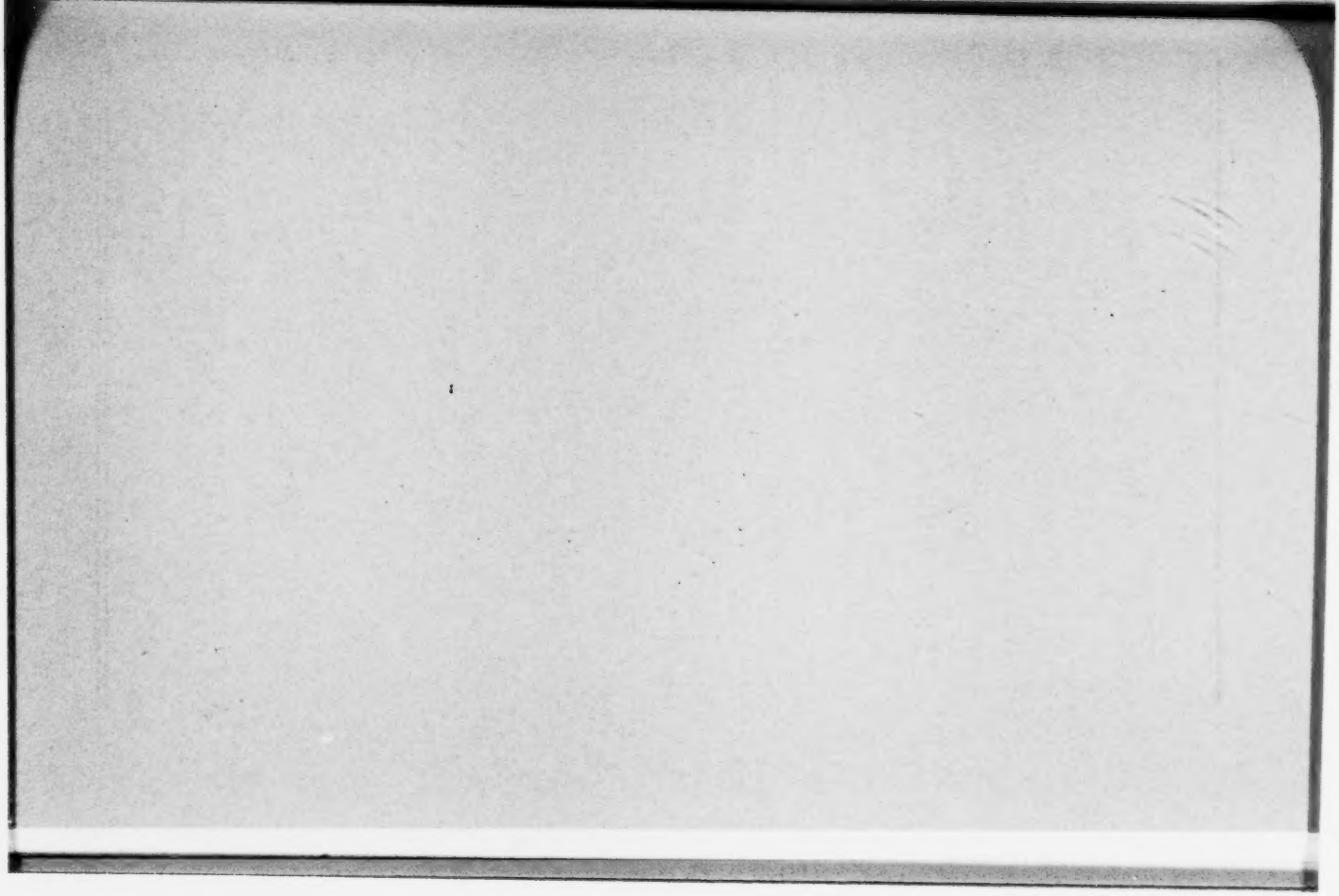

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

NUMBER.....

RADCLIFF GRAVEL COMPANY, INC., and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,

Petitioners,

Versus

JOSEPH H. HENDERSON, as Deputy Commissioner United States Employees Compensation Commission for the Seventh Compensation District, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Radcliff Gravel Company, Inc. and American Mutual Liability Insurance Company pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the case of Radcliff Gravel Company, Inc. and American Mutual Liabiliy Insurance Company v. Joseph Henderson, as Deputy Commissioner United States Employees Compensation Commission for the Seventh Compensation District, et al., Number 10735 on the docket of said court entered on November 3, 1943 (Rec. p. 114) affirming the final judgment of the District Court of the United States for the Southern District of Alabama in said cause (Rec. p. 105).

SUMMARY STATEMENT OF MATTER INVOLVED.

On September 2, 1942, Joseph H. Henderson, as Deputy Commissioner for the Seventh Compensation District, United States Employees Compensation Commission entered an award under the Longshoremen's and Harbor Workers' Compensation Act awarding compensation for the death of an employee of Radcliff Gravel Company, Inc., against petitioners as employer and insurance carrier (R. p. 17). A proceeding was instituted by petitioners in the United States District Court for the Southern District of Alabama to review, set aside and enjoin said order (R. p. 2). A decree dismissing appellant's petition or libel to review, revise and enjoin said order was entered by said District Court (R. p. 105) and on appeal to the United States Circuit Court of Appeals for the Fifth Circuit said decree was affirmed by that court (R. p. 114).

The essential facts in regard to the employment of decedent and the circumstances and conditions under which he met his death were stipulated before the Deputy Commissioner (R. p. 35, 36-39). The facts stipulated show that Radcliff Gravel Company, Inc. employed the decedent, to whose dependent compensation was allowed under the Longshoremen's and Harbor Workers' Compensation Act, with others in dredging operations which it was then conducting at Three Rivers Lake, a navigable body of water in Clarke County, Alabama.

The purpose of the dredging operations was to produce or acquire gravel and sand to be sold by Rad-

cliff Gravel Company, Inc., in the prosecution of a gravel and sand business conducted in Mobile, Alabama. The dredging operations themselves consisted in raising said materials from the bottom of the lake and drawing them through pipes by means of a suction type dredge. These pipes discharged the materials into barges provided by Radcliff Gravel Company, Inc. for their reception. Some workmen or employees operated the dredge, some moved the barges up and down alongside the dredge, while the gravel and sand were being sucked into them by the dredge. The decedent, as the gravel and sand were sucked into the barges, leveled it off to keep it from forming cone-shaped piles. He worked with and as part of the dredging crew, and his work was essentially a part of the dredging operations. He did not place the gravel and sand on the barges. That was done by means of the suction dredge operated by other employees. He had nothing to do with, and took no part in, the moving of the barges to Radcliff's sand and gravel yard in Mobile. His sole function was to level off gravel and sand as it was deposited in barges by the operation of the dredge. The pumping of the gravel and sand into the barges by others was preliminary to and was entirely incidental to its subsequently being towed to Mobile. It was primarily and directly a **dredging operation** to produce gravel and sand by pumping it from the bottom of the lake.

At the time of his death decedent was not engaged in any work under his contract of employment. At six o'clock on the morning of December 23, 1941, he and his shift finished their work for the day and were knocked off until after Christmas. A number of this

shift, including decedent, thereafter started in a small boat propelled by an out-board motor for McIntosh Landing en route to Mobile, where they were to be paid off. They were to go home for the Christmas holidays and were expected to return to work on December 26th. After the out-board motor boat had gone about a mile from the dredge and had reached a point about four miles from McIntosh Landing it capsized or swamped and decedent was thrown into the waters of Three Rivers Lake and drowned. The outboard motor boat was furnished by the employer, Radcliff Gravel Company, Inc. for use in transporting its employees to and from their work at the scene of the dredging and to carry them to and from the shore where they were off duty and had occasion to go ashore and to return to the dredge. Under his employment deceased had nothing to do with the operation of the outboard motorboat and was not operating it on the occasion when he was drowned.

JURISDICTIONAL STATEMENT

This is a civil suit in admiralty in the United States Circuit Court of Appeals for the Fifth Circuit in which petitioners pray a writ of certiorari to review the judgment of said Circuit Court of Appeals, rendered in the above entitled cause on November 3, 1943 (R. p. 114) under section 240 (a) of the Judicial Code of the United States as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question here presented is whether on the stipulated and undisputed evidence the employee's death occurred upon the navigable waters of the United States under such circumstances that compensation could not "validly be provided by State law" so as to bring the case within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U. S. C. A. Sec. 903).

REASONS FOR GRANTING THE WRIT.

United States Circuit Court of Appeals for the Fifth Circuit by its judgment affirming the decree of the United States District Court for the Southern District of Alabama has decided a federal question in a way in conflict with applicable decisions of this court (Sultan Ry. Co. v. Dept. of Labor, 277 U. S., 135, 136-137; 48 S. Ct., 505, 506; 72 L. Ed., 82; Baizley Iron Works v. Span, 281 U. S., 222; 50 S. Ct., 306, 307; 74 L. Ed., 819; Alaska Packers Ass'n. v. Ind. Acc. Comm., 276 U.S., 467; 48 S. Ct., 346; 72 L. Ed., 656; Davis v. Dept. of Labor, 63 S. Ct., 225) and in conflict with the decisions of other Circuit Courts of Appeal.

PALMER PILLANS,

WILLIAM G. CAFFEY,

PROCTORS FOR PETITIONERS.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

OPINIONS BELOW.

There was no opinion rendered by the District Court in the above cause. The opinion in the Circuit Court of Appeals for the Fifth Circuit is reported in 138 Fed. (2d) 549.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on November 3, 1943 (R. p. 114). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 240 (a); 43 Stat., 936).

STATEMENT

A concise statement of the proceedings and of the question involved has been made in the foregoing petition.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Fifth Circuit erred in affirming (R. p. 114) the final decree of the United States District Court for the Southern

District of Alabama (R. p. 105 dismissing the libel of petitioners (R. p. 2).

2. The Circuit Court of Appeals for the Fifth Circuit erred in affirming (R. p. 114) the final decree of the United States District Court for the Southern District of Alabama (R. p. 105) dismissing the libel of petitioners (R. p. 2) for this, that under the undisputed testimony in the cause, compensation for the death of the deceased employee could "validly be provided by state law" and compensation under the Longshoremen's and Harbor Workers' Compensation Act could not properly be awarded under the undisputed testimony.

BRIEF OF ARGUMENT

1. In determining whether a contract be of a maritime nature, locality alone is not controlling, since the true test is the subject matter of the contract—the nature and character of the work to be done under it.

Grant Smith-Porter Co. v. Rohde, 257 U. S. 469; 42 S. Ct., 157; 66 L. Ed., 321.

Erie R. Co. v. Welsh, 242 U. S. 303, 306, 37 S. Ct., 116; 61 L. Ed., 319.

State Ind. Comm. of N. Y. v. Nordenholt Corp., 259 U. S., 263, 42 S. Ct., 473; 66 L. Ed., 933.

2. The obtaining of materials by dredging was the primary purpose of the contract of employment of all Radcliff's dredging crew, including decedent, and a contract of employment to carry on or aid in dredging operations is not a maritime contract.

United Dredging Co. v. Lindberg, 18 Fed. (2d) 453 (C.C.A. 5th Circ.); 274 U. S., 759, 47 S. Ct., 769.

Fuentes v. Gulf Coast Dr. Co., 54 Fed. (2d) 69 (C.C.A. 5th Circ.).

Woods v. Merrill-Stevens D. D. & Rep. Co., 14 Fed., Supp. 208, (S.D. Fla.).

Orleans Dredging Co. v. Frasie, 161 So., 699 (Miss.); 296 U. S., 653, 56 S. Ct., 383.

Central Eng. Co. v. Bassett, 42 Fed. Supp., 750, 752.

Lindberg v. So. Casualty Co., 15 Fed. (2d) 54.

Southern Surety Co. v. Crawford, 274 S. W. 280, 281; 46 S. Ct., 353.

3. Decedent's contract was a contract to engage in "dredging operations," just as the contract of the employee involved in Sultan Ry. Co. v. Dept. of Labor, 277 U. S., 135, 136, 137, 48 Ct., 505, 506; 72 L. Ed., 82, was to engage in "logging operations" (Baizley Iron Works v. Span, 281 U. S., 222; 50 S. Ct., 306, 307, 74 L. Ed. 819 was just as the contract of employees of Alaska Packers Association was to engage in "canning operations", (Alaska Packers Ass'n v. Marshall, 95 Fed. (2d) 279 (C.C.A. 9th Circ.). Surgeon v. Alaska Packers Ass'n, 26 Fed. Supp., 241 (N. D. Cal.). Alaska Packers Ass'n. v. Ind. Acc. Comm., 276 U. S., 467; 48 S. Ct., 346; 72 L. Ed. 656) and just as the employee measuring and cutting steel to proper lengths as it came aboard the barge on which he was working was engaged in "demolition work" in Davis v. Dept. of Labor, 63 S. Ct., 225.

4. Primarily and essentially decedent was employed to aid in the production of gravel and sand for sale in a local business. His contract did not concern the transportation of this material to the employer's yards, and so did not concern navigation or transportation on navigable waters. His services ended before any such transportation was to begin, and if such services were an aid to transportation on navigable waters they were entirely preliminary and purely incidental to such transportation. Decedent's contract of employment was accordingly not a maritime contract.

Sultan Ry. & Tbr. Co. v. Dept. of Labor & Ind., 277 U. S., 135, 138; 48 S. Ct., 505, 72 L. Ed, 820.

Davis v. Dept. of Labor & Ind., 63 S. Ct., 225.

Alaska Packers Ass'n. v. Marshall, 95 Fed. (2d) 279 (C.C.A. 9th Circ.).
Authorities under **2 Supra.**

5. If the contract of employment be considered maritime in any aspect, it involved merely a dredging operation purely local in scope, not "directly connected with commerce and navigation in their interstate and international aspect" (Great Lakes Dr. & Dock Co. v. Charlet, 134 Fed. (2d) 213, 214 (C.C.A. 5th Circ.) and "having only an incidental relation to navigation and commerce" (Sultan Railway & Tbr. Co. v. Dept. of Labor, 277 U. S., 135, 138, 48 S. Ct., 505, 506; 72 L. Ed., 820). In such cases compensation may "validly be provided by state law", and the state compensation law, not the Longshoremen's and Harbor Workers' Act, applies.

Sultan Ry. & Tbr. Co. v. Dept. of Labor, 277 U. S., 135, 138, 48 S. Ct., 505, 506; 72 L. Ed., 820.

Davis v. Dept. of Labor, 63 S. Ct., 225.

Baizley Iron Works v. Span, 281 U. S., 222; 50; S. Ct., 306, 307-8; 74 L. Ed. 819.

Alaska Packers Ass'n. v. Marshall, 95 Fed. (2d) 279 (C.C.A. 9th Circ.).

Travelers Ins. Co. v. Bacon, 119 S. E., 458 (Ga.).

Alaska Packers Ass'n. v. Ind. Acc. Comm., 276 U. S., 467, 48 S. Ct., 346, 72 L. Ed. 656.

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P. J. Carlin Constr. Co. v. Heany, 299 U. S., 41; 57 S. Ct., 75, 76.

Great Lakes Dr. & Dock Co. v. Charlet, 134 Fed. (2d) 213, 214 (C.C.A. 5th Circ.).

United Dredging Co. v. Lindberg, 18 Fed. (2d) 453, 454; 274 U. S., 759; 47 S. Ct. 769.

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Klump v. Ind. Comm., 29 N. E. (2d) 627, 628; 65 Oh. App. 270.
Belk v. Mossman Constr. Co., 275 N. W., 76 (Nebr.).

6. The test of whether decedent was engaged in a maritime service of such character that the state compensation laws could not be validly applied is what employee was doing at the time he met his accidental injury or death, not what he may have been required to do at some other time.

Miller's Ind. Underwriters v. Braud, 270 U. S., 59; 46 S. Ct., 194; 70 Ed., 470.
Parker v. Motor Boat Sales, 314 U. S., 244; 62 S. Ct., 221, 223; 86 L. Ed. 184.
Employers' Liability Assur. Corp. v. Cook, 281 U. S. 233, 236; 50 S. Ct., 308, 309; 74 L. Ed., 823.

7. In this case having definitely terminated all actual service to the employer, the employee while riding to shore in a small boat furnished by his employer in accordance with the contract of employment, was

not rendering any service in direct aid of navigation so as to preclude the application of the State Workmen's Compensation Act.

P. J. Carlin Constr. Co. v. Heany, 299 U. S., 41; 57 S. Ct., 75, 76.
King v. Glenn Falls Ind. Co., 124 Fed. (2d) 942 (C.C.A. 5th Circ.).

8. "Rulings of the deputy commissioner upon questions of law are without finality. So far as the latter are concerned, full opportunity is afforded for their determination by the federal courts through proceedings to suspend or set aside a compensation order**."

Crowell v. Benson, 285 U. S., 22; 52 S. Ct., 285, 290.
And see:
South Chicago Coal & Dock Co. v. Bassett, 309 U. S., 251; 60 S. Ct., 544.
United States Cas. Co. v. Taylor, 64 Fed., (2d) 521 (C.C.A. 4th Circ.).

ARGUMENT

In this case, an Alabama corporation, carrying on a local gravel and sand business, produced gravel and sand for sale in that business by dredging it from the bed of navigable waters in Clarke County, Alabama, conducting it through suction pipes and depositing it on barges which had no motive power and had to be towed to employer's yards at Mobile, Alabama. By Alabama contract decedent was employed to aid in these dredging operations by levelling gravel and sand as it was so deposited. The decedent was not a long-

shoreman or a stevedore in any true sense of those words. He was a dredge employee doing the work of dredge employees. His contract of employment had no direct relation to navigation. It did not concern the transporting of the dredged materials to the employer's yards, and so did not directly concern navigation or transportation on navigable waters. His services, while being rendered only incidentally and indirectly aided navigation, in that they prepared the materials so they could be more readily moved in navigation. These services ended before any transportation was to begin and if such services were an aid to transportation on navigable waters they were entirely preliminary and purely incidental to such transportation. Decedent's contract of employment was accordingly not a contract which would preclude the application of the State Compensation law.

Authorities under Points 3 and 5, **Supra.**

In the case of Sultan Ry. & Timber Co. v. Dept. of Labor, 277 U.S., 135, 48 S. Ct., 505, 506; 72 L. Ed., 820, the contract of employment of some of the employees there involved required them to boom logs on navigable waters so that they could be towed over navigable waters to a point adjacent to the employer's sawmill. Other employees involved, as part of their contract of employment, broke up the booms and actually moved the logs on navigable waters to the sawmill. It was held that this work constituted a service in a local business, in the one instance preliminary to actual transportation on navigable waters, and in the other after actual transportation on navigable waters had ceased and that the State Compensation law rather

than the Longshoremen's and Harbor Workers' Compensation Act applied to such employees. In the present case, the levelling of gravel and sand incidental to the process of dredging such materials into barges for subsequent towage to Radcliff's yards was certainly no more directly in aid of navigation than was the work of booming logs for such towage or the work of breaking up the booms in order that the logs might be moved over navigable waters to the sawmill, and the service was certainly just as local in character. The case now under consideration, as was said in Baizley Iron Works v. Span, 281 U. S., 222, 50 S. Ct., 306, 308-9, has "relation to the nature of the occupation of men engaged" in dredging operations and neither the fact that the service was performed on navigable waters, nor that it incidentally made the barges ready for towage to the employer's yards, changed the nature of said dredging operations or the local character of the employment.

Under the admitted facts, if the deceased employee had met his death while engaged in levelling gravel and sand on one of Radcliff's barges, his case would fall within the principles decided in Sultan Ry. & Timber Co. v. Dept. of Labor, Supra; Davis v. Dept. of Labor, 63 S. Ct., 225; Alaska Packers Ass'n. v. Marshall, 95 Fed. (2d) 279 (C.C.A. 9th Circ.); and Alaska Packers Assn' v. Ind. Accident Commission, 276 U. S., 467, 48 S. Ct., 346; 72 L. Ed. 656.

But decedent at the time he met his death was not levelling gravel and sand on the barge as it was pumped in. That duty had been completed prior to the time that he met his death. At the time of his death he

was merely on board a small boat in the course of his employment and his presence there was "purely incidental" to the duties of his employment and without any direct connection with or aid to navigation. What decedent did or was required to do at a prior time under his contract of employment does not control the question of whether he was or was not performing a service in direct aid of navigation at the time of his death. This question is determined by what he is doing at the time of the accident which resulted in his death.

Miller's Indemnity Underwriters v. Braud, 270 U. S., 59; 46 S. Ct., 194; 70 L. Ed., 470.
Parker v. Motor Boat Sales, 314 U. S., 244; 62 S. Ct., 221, 223; 86 L. Ed., 184.
Employers' Liability Assur. Corp. v. Cook, 281 U. S., 233, 236; 50 S. Ct., 308, 309; 74 L. Ed., 823.

Riding in a small boat furnished by his employer under the contract of employment, for the purpose of going ashore and on leave was not a maritime service in direct aid of navigation which excludes application of the State Compensation law.

P. J. Carlin Constr. Co. v. Heany, 299 U. S. 41, 57 S. Ct., 75, 76.
King v. Glens Falls Indemnity Co., 124 Fed. (2d) 942 (C.C.A. 5th Circ.).

The Circuit Court of Appeals has treated as applicable and as controlling in this case the cases of Parker v. Motor Boat Sales Inc., 314 U. S., 244; South Chicago Coal and Dock Co. v. Bassett, 309 U. S., 251 and Henderson v. Jones, 110 Fed. (2) 952.

In the first of these cases it was considered and ruled by the Court that an employee riding in a small boat driven by an outboard motor with the duty of looking out for snags in the river was so far actually engaged in navigation that the State Compensation law could not be applied to him. In this case, the employee had no duty to perform in the navigation either of the small motor boat in which he was riding to shore for the Christmas holidays, or in the navigation of any loaded barge when it should come to be towed to Mobile.

The other two cases cited involve the direct performance of duties on the part of the employee in aid of the coaling of vessels engaged in navigation. None of these cases is applicable unless it can be truly said, as the opinion of the Circuit Court of Appeals indicates, that all that is necessary to bring a case within the Longshoremen's and Harbor Workers' Compensation Act is that injury or death should have occurred upon the navigable waters of the United States. So to hold is in direct conflict with the decisions of this Court.

Authorities, Points, 1, 4 and 7, **Supra.**

We respectfully submit that the Court of Appeals has misapplied the holding of the cases which it has relied upon and has failed to apply the decisions of other cases in this Court, and in other Courts of Appeal, directly applicable to the facts as disclosed by the stipulated and undisputed facts of the case.

Authorities, Points 3, 4 and 5, **Supra.**

Respectfully submitted,

PALMER PILLANS

WILLIAM G. CAFFEY

PROCTORS FOR PETITIONERS.

(10)

FILED
FEB 23 1944
CHARLES ELMORE CROPLEY

Nos. 655 and 656

In the Supreme Court of the United States

OCTOBER TERM, 1943

RADCLIFF GRAVEL COMPANY, INC., AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, PETITIONERS

v.

JOSEPH H. HENDERSON, DEPUTY COMMISSIONER FOR THE SEVENTH COMPENSATION DISTRICT, SAM ROCKER, ET AL., RESPONDENTS

RADCLIFF GRAVEL COMPANY, INC., AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, PETITIONERS

v.

JOSEPH H. HENDERSON, DEPUTY COMMISSIONER FOR THE SEVENTH COMPENSATION DISTRICT, ET AL., RESPONDENTS

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT HENDERSON IN OPPOSITION

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT HENDERSON IN OPPOSITION

OPINIONS BELOW

The single memorandum opinion rendered for both cases by the District Court of the United

States for the Southern District of Alabama (No. 655, R. 106–107; No. 656, R. 105–106) is not reported. The single opinion of the Circuit Court of Appeals for the Fifth Circuit in both cases (No. 655, R. 114–115; No. 656, R. 112–113) is reported in 138 F. (2d) 549.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 3, 1943 (No. 655, R. 116; No. 656, R. 114). The petitions for writs of certiorari were filed January 31, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in an action under Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act to enjoin and set aside an award of compensation, a finding of the Deputy Commissioner that the decedents were engaged in employment subject to the Act at the time of their death is conclusive if reasonably inferable from undisputed basic facts.

STATUTE INVOLVED

Section 3 (a) of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424 (33 U. S. C. 903 (a)) provides:

> SEC. 3. *Coverage.*—(a) Compensation shall be payable under this Act in respect of

> disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

STATEMENT

The facts in both cases are identical. They have been stipulated as follows (No. 655, R. 36–39; No. 656, R. 35–37):

For some time prior to December 23, 1941, the date of each decedent's death, petitioner Radcliff Gravel Co., Inc., had been engaged in dredging sand and gravel from the bed of the Three Rivers Lake, a navigable body of water in the state of Alabama. These dredging operations were conducted by means of a suction-type dredgeboat which was owned by Radcliff, but was not self-propelled. Empty barges were moved into position alongside the dredge by a gasoline motor launch also belonging to Radcliff; the sand and gravel were loaded on the barges through the suction pipes of the dredgeboat; the barges were moved up and down alongside the dredgeboat by the motor launch until they were evenly loaded and then they were towed to Radcliff's place of business, where they were unloaded for sale in Radcliff's sand and gravel business. This dredging was carried on solely for the purpose of ob-

taining sand and gravel for Radcliff's business, which was entirely intrastate, and not in any way to deepen, widen, or improve the channel. Radcliff, however, was insured against liability for compensation under the Longshoremen's and Harbor Workers' Compensation Act (the "Longshoremen's Act") by petitioner, American Mutual Liability Insurance Co.

Decedents were employed as laborers, whose job was confined to trimming the sand and gravel on the barges at the place of operations of the dredgeboat to keep it from forming a pyramid or a cone. They did not in any way assist in the navigation of any boats, nor did they make any trips up and down the river.

Since there was no other place conveniently near the site of the dredging operations where the workmen could get their meals or a place to sleep between shifts of duty, Radcliff maintained a quarter boat on which meals were prepared and served to the workmen engaged in the operations at that site, and on which sleeping accommodations were furnished them. As part of the contract of employment Radcliff also provided a small boat with an outboard motor attached, for transporting the workmen between the dredge boat, the quarter boat, and the shore.

On the morning of December 23, 1941, decedents, having finished their shift of work, proceeded, together with other workmen, from the dredge boat to the shore by means of the small boat

provided by Radcliff for such purposes. They were on their way to Mobile, Alabama, to be paid off by Radcliff, and then to go home for Christmas; they were supposed to report back for work on December 26. However, before reaching the landing, about a mile from the dredge boat, the boat capsized or swamped as a result of overloading; decedents were thrown into the water and were drowned.

Decedents' dependents each filed a claim with the Deputy Commissioner for compensation under the Longshoremen's Act. Petitioners contended before the Deputy Commissioner that recovery for decedents' deaths through workmen's compensation could validly be provided by state law as provided in the exclusionary provision of Section 3 (a) of the Longshoremen's Act, and therefore that the instant claims for compensation were excluded from the coverage of that Act (No. 655, R. 40–41; No. 656, R. 39–40). The Deputy Commissioner, on the basis of the foregoing stipulated facts, rejected this contention and awarded compensation to each claimant (No. 655, R. 18–19; No. 656, R. 17–18).

Thereafter, pursuant to Section 21 (b) of the Longshoremen's Act (33 U. S. C. § 921 (b)), petitioners filed suits in the district court to enjoin the enforcement of the award (No. 655, R. 1–12; No. 656, R. 1–12). The district court found that the awards of the Deputy Commissioner were supported by substantial and competent evidence, and dismissed the complaints (No. 655, R. 106–

107; No. 656, R. 105–106). On appeal, the court below, in a very brief opinion relying on *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251; *Henderson* v. *Jones*, 110 F. (2d) 952, affirmed the judgments of the district court (No. 655, R. 114–116; No. 656, R. 112–114).

ARGUMENT

Section 3 (a) includes within the coverage of the Longshoremen's Act disability or death resulting from any injury occurring upon the navigable waters of the United States, if recovery therefor "through workmen's compensation proceedings may not validly be provided by State law." Under the doctrine of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, which supplies the basis for the construction of this provision (*Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244), recovery for an injury occurring upon navigable water may be provided by State law only if the employment is of "merely local concern," enforcement of which by the State "would not tend to destroy the characteristic features of maritime law." *London Co.* v. *Industrial Comm'n*, 279 U. S. 109, 120. Cf. *Sultan Ry. & Timber Co.* v. *Department of Labor*, 277 U. S. 135, 137.

In the present case, the Deputy Commissioner awarded compensation to decedents' dependents despite petitioners' contention that decedents at the time of their deaths were not engaged in

"maritime" employment. The district court sustained these awards on the ground that they were supported by substantial evidence, and hence were binding, and this decision was affirmed by the court below. Petitioners admit that the decedents' deaths occurred on the navigable waters of the United States, and do not deny that the deputy commissioner's evidentiary findings of fact are supported by substantial evidence. Their contention apparently is (Pet. p. 12) that the determination of whether the decedents' employment was local or maritime is one of law rather than one of fact; that as a determination of law, the conclusion of the deputy commissioner in the instant cases is erroneous and not binding on the courts; and that on the facts presented this Court should hold, as a matter of law, that decedents' deaths occurred in local employment and hence are compensable only under State workmen's compensation law. We submit that this question is no longer open, since this Court has already decided, contrary to petitioners' contention, that such a determination, particularly when made in regard to situations in the "twilight zone," is one of fact for the Deputy Commissioner and is binding on the courts if supported by substantial evidence. *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244; cf. *Davis* v. *Department of Labor*, 317 U. S. 249.

1. The *Parker* case involved the very question which petitioners seek to raise here—whether

decedent's "employment was 'so local in character' that [a state] could validly have included it under [its] workmen's compensation Act" (314 U. S. 244, 246). The deputy commissioner there found that although the decedent had been hired primarily as a janitor and porter, at the time of his death he was engaged in maritime employment and hence eligible for an award. This Court sustained the conclusion of the deputy commissioner. That questions as to coverage such as were involved in the *Parker* case are not to be treated as matters of law but are to be determined with due respect for the administrative decision appears from *Davis* v. *Department of Labor,* 317 U. S. 249, where the Court said with respect to issues as to the line of demarcation between the state and federal jurisdiction (pp. 256–257:[1]

> Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There, we are aided by the

[1] In *Crowell* v. *Benson*, 285 U. S. 22, this Court in order to avoid constitutional doubts construed the Longshoremen's Act to permit an independent judicial determination of the existence of an employment relationship deemed to involve constitutional "jurisdictional" facts which bore upon the power of Congress to enact the statute. Since it is clear that Congress may constitutionally provide for all injuries of employees occurring on navigable waters (*Smith & Son* v. *Taylor*, 276 U. S. 179, 181), that case is not opposed to our position here.

provision of the federal act, 33 U. S. C. § 920, which provides that, in proceedings under that act, jurisdiction is to be "presumed, in the absence of substantial evidence to the contrary." Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commissioner's findings in *Parker* v. *Motor Boat Sales, supra.*

The finality thus accorded to the deputy commissioner's findings as to whether the employment is maritime or local is merely an application of the doctrine earlier enunciated in *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251, 258,[2] which involved another question of coverage on undisputed primary facts under the Longshoremen's Act. The same principle has been applied by this Court to similar determinations as to

[2] The lower federal courts have on numerous occasions held, upon the authority of the *South Chicago* case, that conclusions of a deputy commissioner as to questions of coverage under Section 3 (a) (1) of the Act are determinations of fact binding upon the courts if sustained by evidence. See, e. g., *Puget Sound Freight Lines* v. *Marshall,* 125 F. (2d) 876 (C. C. A. 9); *Henderson* v. *Jones,* 110 F. (2d) 952 (C. C. A. 5); *Gulf Oil Corp.* v. *McManigal,* 49 F. Supp. 75 (N. D. W. Va.); *Blaske* v. *Bassett,* 35 F. Supp. 315 (E. D. Mo.); cf. *Bowen* v. *Shamrock Towing Co.* (C. C. A. 2), No. 131, October Term, 1943 (decided December 29, 1943).

coverage under other statutes; such matters have been treated as questions of fact submitted to the judgment of the agency charged with its administration. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 181; *Gray* v. *Powell*, 314 U. S. 402, 412; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 400; *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 145.

The test thus is whether the Deputy Commissioner's determination was a rational conclusion supported by substantial evidence. The employment in question was on a movable barge in navigable waters, and involved the loading of a vessel. Cf. *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251. The injury causing death occurred in the course of the employment, and while the employees were proceeding on a vessel to the shore after the completion of work. Cf. *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244. Moreover, decedents ate and slept on navigable waters. The combination of factors here present point more strongly to a conclusion that the employment was maritime than those which this Court has found adequate to sustain a similar conclusion in other cases. Cf. *Parker* v. *Motor Boat Sales, Inc., supra.*

Petitioners contend that decedents' employment must be regarded as local, and in support thereof cite a number of cases. But it is impossible to say, from the facts in this case, that the employ-

ment must be regarded as local as a matter of law, for the preponderance of the factors are more akin to maritime than to local concern. Decedents spent their entire working hours on board a vessel in navigable waters; the only time they set foot on land, so far as the record shows, was when their work was interrupted by a holiday. It is true that decedents' duties related to the loading of sand and gravel which, after being dredged from the waters, was intended for local sale on shore; but the same is true of cargo aboard a vessel being loaded or unloaded by a longshoreman, and this circumstance has never been thought to render the Act inapplicable to such employment.

2. Even conceding, however, that the intended use of the sand and gravel to which decedents' employment related gave their employment a sufficient local concern to support the application of the state compensation law, it does not follow that an award under the federal act is invalid. There are decisions in both federal and state courts which support the Deputy Commissioner's view.[5] Factual situations such as those here involved, containing elements of local as well as of maritime concern, fit within the "shadowy area" susceptible of either state or federal compensation. In *Davis* v. *Department of Labor*, 317

[5] See cases cited in *Davis* v. *Department of Labor*, 317 U. S. 249, 253 n. 2; and in *Motor Boat Sales* v. *Parker*, 116 F. (2d) 789 (C. C. A. 4).

U. S. 249, involving an application for compensation under the state act on account of death of an employee working on a barge, this Court recognized that it "has been unable to give any guiding, definite rule [as to the line of demarcation between state and federal power] in advance of litigation * * *. The determination of particular cases, of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here" (p. 253). Accordingly, although this Court apparently felt that the situation before it was properly compensable under the Longshoremen's Act (cf. Chief Justice Stone, dissenting, 317 U. S. at pp. 260, 261), it held the claimant entitled to an award under the state compensation law. This decision was based on a refusal to require claimants "to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership", for such a requirement would subject the claimant to possible "serious financial loss" and loss of claim through operation of the statute of limitations "in the proper forum while he was erroneously pursuing it elsewhere" (p. 254).

In the instant cases, therefore, the situation would clearly fall within the "twilight zone," requiring affirmance of the conclusion of the

deputy commissioner awarding compensation under the federal law. This conclusion will not press too sharply upon Radcliff, since it has already secured the payment of compensation under the Longshoremen's Act (R. 35) and, hence, is not subject to the penal provisions for failure so to provide. Secs. 38, 32 (33 U. S. C. §§ 938, 932); *Davis* v. *Department of Labor, supra,* at 255.

CONCLUSION

The decision below is correct and does not call for review. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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